

# Civil Liability Reform

## The Problem

Frivolous lawsuits, rulings against the state and local governments, and excessive noneconomic damage (pain and suffering) awards cost Washington consumers and taxpayers millions of dollars annually and threaten access to affordable health care, affordable housing, and vital services. People are losing their jobs because companies, especially small firms, are being sued out of business.

## The Solution

On Election Day, voters sent the medical malpractice crisis back to the Legislature for a solution. The task now at hand is bringing stakeholders to the bargaining table and focusing the debate on the goal of protecting and improving access to affordable health care through responsible and meaningful medical liability reform. State agencies and local governments also need legislative leadership in finding an equitable solution to government liability -- an exposure that is costing Washington taxpayers hundreds of millions of dollars every year in insurance costs and tort claims. Sovereign immunity should be rescued from court decisions that have ignored the Legislature's intent to hold the state liable only for operational activities -- the same level of liability shared by individuals and corporations.

## Sovereign Immunity

State agency self-insurance costs for tort liability were estimated to be \$173 million for the 2003-05 biennium, or about \$110 per Washington family. This could have funded 7,000 new college enrollments; the entire general fund cost of Western Washington University; or a 15 percent increase in beginning teachers' salaries (*Senate Ways & Means*).

At common law<sup>1</sup>, governments are immune from all lawsuits. Sovereign immunity was waived in Washington in 1961.<sup>2</sup>

Two-thirds of our nation's states limit the amount of damage awards against the state. About 80 percent of states have total or partial immunity. The same number has immunity from parolee conduct. Unlike most other states, Washington has no immunity.

<sup>1</sup>The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws.

<sup>2</sup> When the Legislature waived sovereign immunity in 1961, it intended to give the state liability for operational activities, like driving vehicles and performing property maintenance. The original waiver provided for liability for the state to the same extent as that of a private person or corporation. At the time of the 1961 waiver, it was accepted legal doctrine that there was no liability for purely governmental functions, such as regulation, corrections, public welfare, and highway design and improvement.

Starting in the mid-1970s, the state Supreme Court began creating liability for governmental functions without applying the private liability condition or analyzing the context of the 1961 waiver.

In Washington, liability for governmental functions is a major source for the rapidly rising claim and legal defense costs of state and local government. Most of the liability for governmental functions does not arise from any direct act or wrong by a public employee, but from the alleged failure of government to prevent a third party wrongdoer, such as a former prison inmate or a drunk driver, from committing a crime or having an accident.

Washington has responsible risk management processes in place and these efforts are making Washington safer, but they can not possibly protect against all third-party actions.

## **Offender Supervision**

In FY 05, Washington provided some type of community supervision for 36,323 male offenders and 7,831 female offenders.

**Joyce Decision: A case study in civil liability** - Mrs. Joyce was killed in a car accident caused by a parolee who had stolen a car. The trial court awarded a **\$22.5 million judgment against the state**, saying the state had a duty to return the offender to incarceration as a result of his previous failures to abide by the terms of his supervision. On appeal, the Washington State Supreme Court held that, "Once the State has taken charge of an offender, the State has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees." However, the Court remanded the case for a new trial based on instructions to the previous jury. The instructions had misstated the legal effect of the Department of Correction's policies regarding the duty to report conditions that violate community supervision.

## **Medical Malpractice Reform**

### **Nationwide:**

- The annual cost of America's tort system exceeded \$165 billion in 1999.
- The average person pays \$1,200 per year in "lawsuit taxes" – or added liability costs passed on to the consumer by insurance companies, manufacturers, and other businesses ([www.cala.org/cause.html](http://www.cala.org/cause.html)).
- The median jury award in medical malpractice cases increased from \$500,000 in 1995 to \$1 million in 2000 ([www.juryverdictresearch.com](http://www.juryverdictresearch.com)).
- Between 1975 and 2002, medical malpractice insurance premiums in the U.S. rose 750 percent. In California (which has a cap on noneconomic damages), during the same period, medical malpractice insurance premiums rose only 245 percent (*National Association of Insurance Commissioners, 2003*).

### **Washington:**

- According to the Washington State Medical Association (WSMA), medical malpractice insurance costs are having a growing impact on Washington's health care delivery system. Between 1998 and 2002, more than 500 doctors left the state – an increase of 31 percent from previous years. Between 1996 and 2001, the number of doctor retirements increased 50 percent over previous years and the average age of retirement dropped from 63 to 58. Many others are limiting their practices, especially in high-risk field like obstetrics and neurosurgery.
- Twenty percent of Washington's obstetricians have already stopped practicing and 55 percent said they would drop obstetrics if their malpractice premiums reached between \$40,000 and \$70,000. The average OB-GYN in our state already pays \$41,000 in medical liability premiums – up 287 percent from only a decade ago.
- Washington malpractice claims in 2001 cost insurers \$44.7 million. This cost is passed on to health care providers and to patients, not only in the increased cost of health care, but in reduced access.

## **Initiative 330 – Washington State Medical Association**

✓ **Election Night - November 8, 2005:** I-330 failed statewide. Voters approved the measure in all Eastern Washington counties except Ferry and Pend Oreille. The "no" vote was over 60 percent in King, Snohomish and Kitsap counties. The measure would have:

- Capped noneconomic damages at \$350,000. An additional \$700,000 may have been recovered if a health institution was found liable for activities of someone other than a health care professional.
- Limited attorneys' fees based on a sliding scale. Attorneys would have received a maximum of \$220,000 on a \$1 million award.
- Required 90 days notice of intent to file a medical malpractice lawsuit.
- Tightened the statute of limitations for filing cases. The time limit for filing a malpractice lawsuit would have been three years from the date of the injury. Exceptions would have existed for proof of fraud, concealment, or the presence of a foreign body. Under these circumstances, a person would have had one year from the date of discovery to file suit. In the case of a minor whose parents or guardians committed fraud or collusion regarding the injury, the time limit would have been one year from the date of discovery of the fraud or collusion or within one year of the minor's eighteenth birthday, whichever provided a longer period. In the case of a minor under the age of six, a lawsuit would have had to be filed within three years or before the minor's eighth birthday, whichever provided a longer period of time.
- Abolished the collateral source rule. Evidence could have been presented of compensation (including future compensation) from any other source.
- Permitted arbitration clauses in contracts for medical services as long as they included certain language.
- Permitted periodic payments of noneconomic damages. The threshold point at which periodic payments may have been awarded would have been lowered to \$50,000.
- Limited joint and several liability. Each party would have been responsible only for their proportion of the damages, unless the parties were found to be acting in concert.
- Limited vicarious liability of hospitals. Hospitals would have been only responsible for actual agents or employees.
- Limited liability of health care providers. Health care providers would have been only responsible for themselves and those acting under their direct supervision or control.

### **What are noneconomic damages?**

The term "noneconomic damages" can be confusing. Capping noneconomic damages applies only to damages awarded for intangibles, such as pain and suffering, mental anguish, or loss of companionship.

Capping awards for noneconomic damages does not deny justice to injured persons. Injured persons are STILL entitled to:

- Payment of all future wages, with a built-in assumption for inflation and promotions;
- Payment of all medical bills, including prescription drugs;
- Payment of all necessary custodial care, including long-term care and nursing home care;
- Payment of all incidental costs related to the injury, such as special vehicles to accommodate wheelchair access;
- Payment of any in-home care equipment needed; and
- Attorney fees may also be paid, depending on the case.

### **Initiative 336 –Washington State Trial Lawyers**

✓ **Election Night - November 8, 2005:** I-336 failed statewide. Voters rejected the measure in all counties except Pacific, Wahkiakum, Clark, Skamania and Klickitat counties. The measure would have enacted the following changes:

### Insurance Reforms

- Required public notice and hearings on malpractice rate increases. The Insurance Commissioner would have been required to hold a public hearing before any proposed malpractice insurance rate increase of 15% or greater could be approved.
- Required all medical malpractice verdicts or settlements over \$100,000 to be reported to the Department of Health.
- Created a supplemental malpractice insurance program that health care providers and institutions could purchase to provide a secondary layer of insurance coverage.
- Required all insurers to report to the Insurance Commissioner every month any claim related to medical malpractice.

### Health Care Reforms

- Required the revocation of a medical license for a physician with three judgments of medical malpractice entered against him or her within a ten-year period, unless there are mitigating circumstances.
- Increased the number of citizen members of the Washington State Medical Quality Assurance Commission from four to six.
- Required a health care provider to disclose within 15 working days all information relating to any adverse medical incident, upon the request of a patient or a patient's family.
- Required a health care provider to disclose his or her experience with the treatment, including treatment outcomes, upon patient request.

### Legal Reforms

- Limited the number of expert witnesses to two witnesses per issue for each side in a medical malpractice action.
- Required attorneys filing a medical malpractice claim to file a certificate of merit that the claim is not frivolous. Within 120 days of filing suit, an attorney would have had to file a certificate of merit from a qualified medical expert.

### **Federal Frivolous Lawsuit Measure**

In late October 2005, the U.S. House of Representatives, on a vote of 228-184, approved H.R. 420, a bipartisan measure designed to prevent the filing of frivolous lawsuits. The measure is now awaiting a vote in the U.S. Senate. According to the National Federation of Independent Business, "If signed into law, the legislation will significantly reduce the culture of predatory lawsuits harming our small businesses, communities and economy." NFIB research shows that a single lawsuit costs the average small-business owner \$5,000 just to settle.

### **H.R. 420, the Lawsuit Abuse Reduction Act of 2005**

- Permits judges to order plaintiffs to reimburse reasonable litigation costs, including attorney fees;
- Makes sanctions mandatory against attorneys or parties who file frivolous, rather than discretionary, lawsuits.
- Removes a "safe harbor" provision that allows plaintiffs and their attorneys to avoid sanctions for frivolous suits by withdrawing them within 21 days; and
- Reduces "court-friendly shopping" by requiring that plaintiffs in civil tort actions sue only where they live or were injured, or where the defendant's principal place of business is located.